

1999

Red Cliffs Regional, Inc., and Business Insurance Company v. Labor Commission of Utah and Glenda Chambers : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS 50

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CKET NO. 990131

RED CLIFFS REGIONAL, INC., and
BUSINESS INSURANCE COMPANY,

Petitioners,

vs.

LABOR COMMISSION OF UTAH and
GLENDA CHAMBERS,

Respondents.

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Case No. 990131-CA

Priority No. 7

REPLY BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE LABOR COMMISSION DENYING A
MOTION FOR REVIEW, ENTERED NOVEMBER 10, 1999

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Clerk of the Court

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ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE IS IN A SUPERIOR POSITION TO ASSESS WITNESS CREDIBILITY .

The function of the administrative law judge in the workers' compensation setting is akin to the function of the fact-finder in the civil arena. Therefore, the administrative law judge's assessment of the credibility of witnesses should generally be binding on the reviewing court, which in this case is the Appeals Board. The administrative law judge, not the Appeals Board is in the best position to make a credibility determination, and as such, a credibility determination of a witness should only be overturned if it is clearly erroneous. In this case, there was substantial evidence to support the Findings of the Administrative Law Judge, and therefore, they should have been upheld. By finding that the Administrative Law Judge is not in a position to make credibility determinations, we are in effect taking away any role that the Administrative Law Judge may play in the adjudicative process. If the Administrative Law Judge does not have any role to fulfill, why not eliminate the position altogether and send the cases right to the Appeals Board and let them make the determination. Why have an Administrative Law Judge if the Appeals Board is going to ignore the findings of the Administrative Law Judge and enter its own finding and conclusions.

A. The Appeals Board must consider the Findings of the Administrative Law Judge.

The Respondent's reliance on United States Steel v. Industrial Com'n, 607 P.2d 807 (Utah 1980), is misplaced. While it is true that it was held that the Commission may make its own findings on the credibility of the evidence presented, the Supreme Court also held that in so doing, the Commission must consider the findings of the Administrative Law Judge as part of the record. Id. at 810; See also Adams v. Industrial Comm'n of Arizona, 710 P.2d 1073, 1075 (Ariz. App. 1985) ("Normally, a proper credibility evaluation requires that the fact finder hear and observe the witness. Credibility is not readily discernible by one who merely reads a cold record.").

In United States Steel the Administrative Law Judge found there was not an industrial accident, which finding was then overturned by the Commission. The Commission found that the applicant's failure to report an accident sheds light on whether an accident occurred, but is not enough for denying relief. Id. at 812. Although there was similar conflicting testimony with regards to Ms. Chambers' reporting of the accident, and that of the applicant in United States Steel, the similarities between the two cases ends there. The focus in United States Steel was on the applicant's failure to report the injury. The Appeals Board in this case

incorrectly reversed the credibility determination made by the administrative law judge focusing only on the evidence surrounding the reporting of the accident. (See, R. 261-263; Order of Remand, page 2). However, as pointed out in the Brief of Appellant, the fact that the applicant failed to immediately report the accident is only one fact that was considered by the administrative law judge in its credibility determination, and the Appeals Board reversal of the administrative law judge's credibility determination on this fact alone was clearly erroneous. There were also other issues that were analyzed by the administrative law judge in making its credibility determination of the applicant. The Administrative Law Judge was able to observe and witness the applicant as she gave her testimony. The applicant also began working full-time for another employer the day after the alleged accident. It was also reported by the applicant that she was unable to pursue treatments for her alleged back injury because Red Cliff denied compensation benefits. (R. 330, page 38 lines 13-15). However, upon cross examination, the applicant testified that treatments were not stopped due to a lack of money as she had earlier testified. (R. 330, page 74 lines 10-21). Next, the applicant reported that she reported her injury to Val Penman, an employee at Red Cliffs (R. 330, page 28 lines 14-23)., however, he did not remember ever talking to the applicant about a work injury. (R. 330, page 103 lines 15-20). He testified that if she would have notified him, he would have filled out an incident report since which was the standard procedure.

Furthermore, Respondent fails to point out that the Court in United States Steel, held that the findings of the Administrative Law Judge must be considered as part of the record. Respondent also fails to address a more recent case decided by the Supreme Court where it was held that the trier of fact or the hearer of evidence is in the best position to ascertain credibility of witnesses, and as such, deference should be given to the initial decision maker on questions of fact because it stands in a superior position from which to evaluate and weigh the evidence and assess the credibility and accuracy of witnesses. Drake v. Industrial Comm'n, 939 P.2d 177 (Utah 1997). Similarly, it has been held that the Administrative Law Judge's findings are to be affirmed as long as the evidence supports those findings. See Birrell v. Ind. Comm'n, 740 P.2d 1331 (Utah 1987).

In the case at hand, the Administrative Law Judge, not the Appeals Board heard the evidence and witnessed the testimony of the various witnesses. As such, the Administrative Law Judge was clearly in a superior position to evaluate and weigh the evidence and assess the credibility of the witnesses. The Appeal Board was required to consider the Findings of the Administrative Law Judge and should have given deference to the Findings of the Administrative Law Judge.

- B. The function of the Administrative Law Judge is similar to that of the fact-finder in the civil arena.

The function of the administrative law judge in the workers' compensation setting is akin to the function of the fact-finder in the civil arena. Adams v. Industrial Comm'n of Arizona, 710 P.2d 1073, 1076 (Ariz. App. 1985).

Respondent attempts to distinguish this case on the basis that the system used in Arizona is not comparable to Utah's system because the ALJ's decision constitutes final agency action as opposed to Utah's system which allows additional agency action. In addition, Respondent points out that in Adams the question involved a replacement ALJ substituting its own findings for the original ALJ. (See Appellee's Brief at page 16). Contrary to Respondents position the underlying issues addressed in Adams, and those in this case are the same. In both the Arizona case and this case, the findings of the original ALJ are being substituted or replaced by a reviewing individual or board. As such, the holding and reasoning in Adams, can be applied here. Appellate courts have therefore consistently espoused the rule that the administrative law judge's assessment of the credibility of witnesses is generally binding on the reviewing court. The purpose of this rule is that the fact finder is in the best position to consider the voice tone, hesitation or readiness with answers, his eyes, pitch or uncertainty of the witness's voice, gestures, expressions, and other non verbal communication. Id. Much like Adams or in a civil arena, the fact-finder,

who in this case would be the Administrative Law Judge, is in the best position to consider credibility of a witness as they testify and deference should be given.

In this particular case, the administrative law judge, not the appeals board was in a position to observe the countenance and candor of the Applicant as she attempted to testify. What the administrative law judge observed as the Applicant testified, could not be reviewed or observed by the Appeals Board by reviewing a written record. By only reviewing the written testimony, the Appeals Board is only reviewing part of the testimony of the Applicant. The applicant's voice tone, facial expression, body language, skin tones, fidgety movements, the confidence in her answers, lack of eye contact, all affect the credibility determination made by the administrative law judge which the Appeals Board was unable to review by looking at the written record. These are all items that cannot be reviewed by the Appeals Board, and historically are items that have not been the subject of an appeal. The administrative law judge who takes the actual evidence and reviews the testimony is in the best position to feel what is being presented and to get a sense of the applicant's credibility. See Drake v. Industrial Comm'n, 939 P.2d 177 (Utah 1997). Therefore, the Appeals Board failure to consider the Findings of the Administrative Law Judge was improper, and the Findings of the Administrative Law Judge should be upheld as they were supported by substantial evidence. The Appeals Board failed to show or find that the ALJ's findings were clearly wrong.

It is clear from the evidence that the Appeals Board reversal of the administrative law judge's credibility determination based solely on the fact that the applicant may or may not have immediately reported the accident is contrary to the weight of the evidence. As stated above, there were numerous other factors which the administrative law judge based his credibility determination on besides the fact that the applicant did not immediately report her injury. The administrative law judge, not the Appeals Board is in the best position to make a credibility determination, and such determination should only be overturned if it is clearly erroneous. In this case, there was substantial evidence to support the findings of the Administrative Law Judge, and therefore, they should have been upheld.

II THE ADMINISTRATIVE LAW JUDGE IMPROPERLY AWARDED TEMPORARY DISABILITY AS THE APPLICANT HAD REACHED STABILIZATION.

It has been held that "every person who brings a claim in a court or at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal." Bunnell v. Ind. Comm'n, 740 P.2d 1331, 1333 (Utah 1987). The administrative law judge initially found that because of the applicant's lack of credibility, there was no industrial accident. Therefore, there was no need for Red Cliff to present any evidence regarding the applicant's claim for temporary disability payments. However, due to the Appeals Board reversal of the

decision of the administrative law judge, the administrative law judge found that the applicant was entitled to temporary partial disability payments through August 25, 1997. (R. 274-278). The administrative law judge's award of temporary disability payments exceed the time in which the applicant had reached medical stabilization, and therefore it should be at a minimum modified to reflect only the time until the applicant had reached stabilization.

- A. Stabilization occurs at that point in time that there is nothing more that can be done.

When a claimant reaches medical stabilization, she is no longer eligible for temporary benefits. Griffith v. Industrial Comm'n, 754 P.2d 981 (Utah Ct. App. 1988). The administrative law judge's award of temporary partial disability payments through August 25, 1997, exceeded the time in which the applicant had reached medical stabilization. (R. 274-278). Temporary disability benefits are to be discontinued as soon as the point of medical stabilization is reached. Reddish v. Sentinel Consumer Prods., 771 P.2d 1103 (Utah Ct. App. 1989). The medical records clearly indicate that the applicant had reached stabilization long before August 25, 1997, therefore, the administrative law judge erred in extending disability payments past the point at which the applicant had reached stabilization. The medical records are clear that the applicant had reached stabilization long before August 25, 1997, as the applicant did not seek any treatment for her back

after April of 1997. (R. 330, page 81). Another key indicator that the applicant had reached stabilization long before August of 1997, was the fact that it was reported there was nothing more that could be done, therefore therapy for her back was discontinued. (R. 330, page 74). Furthermore, there is no indication in the medical records that the applicant had not healed from the alleged accident. The fact that it was reported there was nothing more that could be done for the applicant along with no indication whatsoever in the records that the applicant had not healed from the alleged accident indicates that stabilization had occurred.

- B. Temporary disability payments are not proper as the applicant began working full-time for another employer immediately after the accident.

Temporary disability ceases when the claimant returns to work initially following accident. Sanderson v. Industrial Comm'n, 400 P.2d 756 (Utah 1965). Temporary disability payments "are intended to compensate a [worker] during the period of healing and until she is able to return to work. . ." Intermountain Health Care, Inc. v. Ortega, 562 P.2d 617, 619-20 (Utah 1977); Second Injury Fund v. Streater Chevrolet, 709 P.2d 1176 (Utah 1985). The applicant was clearly able to return to work as she went to full-time status the very next day at her other job. Therefore, an award of temporary disability was improper and should be overturned.

Prior to the alleged accident, the applicant had only been working part-time at both places of employment, and immediately after the accident she began working full-time for her other employer, Washington ARC. (R. 330, page 46 lines 15-18; R. 57). As previously stated, the record is clear that the Ms. Chambers was able to perform light duty work as she continue working for Washington ARC, and went to work the very next day. Another important factor is the fact that Ms. Chambers went from a part-time employee working approximately 18-20 hours per week to basically a full time employee immediately after the accident.

Providing Red Cliff the opportunity for a hearing would have allowed them to point out the evidence that was already before the judge in the form of the medical records exhibit, which clearly refuted the applicant's claim for temporary disability payments, which at a minimum, would have established that she had reached medical stabilization in March 1997. Any temporary disability payments should have ceased in March of 1997, as the medical records clearly established that the applicant had reached stabilization. Temporary disability payments are to be discontinued upon returning to work. The applicant never missed work because of the accident, therefore, Red Cliffs should not be required to pay any type of temporary disability payments to the applicant.

CONCLUSION

For the foregoing reasons, Red Cliff respectfully requests that the findings of fact of the Appeals Board be set aside and order that the administrative law judge findings as to the credibility determination be upheld. In the alternative, Red Cliffs request that the decision by the administrative law judge denying them of a hearing with regards to temporary disability be overturned. Finally, Red Cliffs requests that the award for temporary disability payments be overturned as it should not be required to pay any temporary disability because the applicant was able to perform light duty work, and refused to perform light duty work at Red Cliffs, but rather began working full-time for another employer.

DATED this the 19th day of July, 1999.

PLANT, WALLACE CHRISTENSEN & KANELL

A handwritten signature in black ink, appearing to read 'Robert C. Olsen', is written over a horizontal line.

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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the Appellant's Reply Brief was mailed on the 19th day of July to the following by first class mail postage prepaid.

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